

OPNAVINST 12000.14 CH-47

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File Immediately Following Chapter 752 of the FPM

## DEPARTMENT OF NAVY ADVERSE ACTIONS

## I. PURPOSE

This instruction establishes the Department of the Navy (DON) regulations for effecting adverse actions and provides guidance in disciplinary actions.

## II. DEFINITIONS

A. "Activity" means a field installation, headquarters command, or office.

B. "Appealable Adverse Action" means a removal, suspensions for more than 14 days, reduction in grade or pay, or furlough for 30 days or less.

C. "Days" means calendar days.

D. "Employee" means:

1. For purpose of grievable adverse actions, a member of the Senior Executive Service or an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed one year of current continuous employment under other than a temporary appointment limited to one year or less; and

2. For purpose of appealable adverse actions:

a. those employees listed in D1,

b. a preference eligible in the excepted service who has completed one year of current continuous service in the same or similar position, and

→ c. an employee who occupies a professional and administrative career (PAC) position on Schedule B of part 213 of the title, provided that the employee has completed a trial period of one year after initial appointment in such a position. ←

E. "Furlough" means the placing of an employee in a temporary status without duties and pay because of a lack of work or funds or other nondisciplinary reasons.

F. "Grade" means a level of classification under a position classification system.

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G. "Grievable Adverse Action" means a letter of reprimand or a suspension for 14 days or less.

H. "Letter of Admonishment" means a written correction by a superior official of an employee's improper conduct.

I. "Letter of Reprimand" means a written remedy by a superior official for an employee's improper conduct.

J. "Noncontestable Action" means an oral admonishment or a letter of admonishment, i.e., an action not recorded in an employee's Official Personnel Folder.

K. "Official" means an employee who has been delegated authority to propose or decide an adverse action under this instruction.

L. "Oral Admonishment" means an oral (non-written) correction by superior official of an employee's improper conduct.

M. "Pay" means the rate of basic pay fixed by law or administrative action for the position held by an employee.

N. "Removal" means the involuntary separation of an employee from the activity except when taken as a reduction-in-force action.

O. "Suspension" means the placing of an employee in a temporary status without duties or pay for disciplinary reasons.

### III. COVERAGE

This instruction applies to all Department of Navy employees as defined in II.D. above except:

A. An employee of a non-appropriated fund instrumentality;

→ B. Schedule B excepted service employees without competitive status, and Schedule B professional and career (PAC) position employees who are serving their one-year trial period; ←

C. An employee whose appointment is made by and with the advice and consent of the Senate;

D. An employee whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by:

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1. The Office of Personnel Management for a position that it has excepted from the competitive service; or

2. The President or the Secretary of the Navy for a position which is excepted from the competitive service by statute, and

E. Reduction in grade or pay and furlough for 30 days or less for a member of the Senior Executive Service;

F. For suspensions of 14 days or less, members of the Senior Executive Service and employees as defined in IID2b.

→ G. Removal or suspension for more than 14 days of a noncareer, limited term, or limited emergency Senior Executive Service appointee; or such removal or suspension of a career SES member during the probationary period who, by virtue of the appointment held immediately prior to entry into the SES, was not covered. ←

#### IV. EXCLUSIONS

A. A suspension or removal taken in the interests of national security. (5 USC 7532)

B. A reduction-in-force action.

C. The reduction in grade of a supervisor or manager who has not satisfactorily completed the probationary period if such reduction is to the grade held immediately before becoming such a supervisor or manager. (5 USC 3321)

D. A reduction in grade or removal based solely on unacceptable performance. (5 USC 4303)

E. An action initiated under authority of the Special Counsel or taken at the direction of the Merit Systems Protection Board. (5 USC 1205, 1206, 1207)

F. An action taken under provision of statute, other than one codified in 5 USC, which excepts the action from subchapter II of Chapter 75 of 5 USC.

G. An action which entitles an employee to grade retention and an action to terminate this entitlement. (5 USC 5362)

H. A voluntary action initiated by the employee.

I. An action taken or directed by the Office of Personnel Management for suitability reasons. (5 CFR Parts 731 and 754)

J. Involuntary retirement because of disability.

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K. Termination of appointment on the expiration date specified as a basic condition of employment at the time the appointment was made.

L. Action which terminates a temporary promotion within a maximum period of two years and returns the employee to the position from which temporarily promoted, or reassigns or demotes the employee to a different position not at a lower grade or level than the position from which temporarily promoted.

M. An action which terminates a term promotion at the completion of the project or a specified period, or at the end of a rotational assignment in excess of two years but not more than five years, and returns the employee to the position from which promoted or to a position of equivalent grade and pay.

N. Cancellation of a promotion to a position not classified prior to the promotion.

O. Placement of an employee serving on an intermittent, part-time, or seasonal basis in a nonduty, nonpay status in accordance with conditions established at the time of appointment.

P. Reduction of an employee's rate of pay from a rate which is contrary to law or regulation to a rate which is required or permitted by law or regulation.

Q. An action against a reemployed annuitant.

R. An action against a Presidential appointee.

#### V. DELEGATION OF AUTHORITY

Heads of activities are delegated authority to propose and decide adverse actions under this instruction. Activity heads shall redelegate authority to propose and decide such actions to subordinate supervisors and managers to the extent they deem appropriate.

#### VI. STANDARD FOR ACTION

A. Activities shall take an adverse action against an employee only for such cause as will promote the efficiency of the service.

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B. Activities may not take an adverse action against an employee on the basis of any prohibited personnel practice. (5 USC 2302)

C. Appendix A provides guidance on taking disciplinary actions.

D. Appendix B is the DON guideline schedule of disciplinary offenses and remedies.

#### VII. PROCEDURES FOR NONCONTESTABLE ACTIONS

A. An oral admonishment will not be counted as a prior offense when determining a remedy under Appendix B. An oral admonishment will not be made a matter of record in an employee's Official Personnel Folder. An oral admonishment is neither grievable nor appealable.

B. A letter of admonishment will:

1. Specify the reasons for its issuance,
2. Specify that the letter of admonishment is neither grievable nor appealable.
3. State that it will not be made a matter of record in an employee's Official Personnel Folder, and
4. State that it will not be counted as a prior offense when determining a remedy under Appendix B.

#### VIII. PROCEDURES FOR GRIEVABLE ADVERSE ACTIONS

A. A letter of reprimand will:

1. Specify the reasons for its issuance,
2. Specify the employee's right to file a grievance under CPI 771 or under a negotiated procedure, as appropriate,
3. State the length of time, not less than one nor more than two years, that it will be made a matter of record in the employee's Official Personnel Folder, and

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4. State that it may be counted as a prior offense when determining a remedy under Appendix B.

B. An employee against whom a suspension of 14 days or less is proposed is entitled to:

1. An advance written notice stating:

a. the specific reasons for the proposed action,

b. the name and title of the official designated to hear an oral reply and/or receive the written reply (the official so designated must have authority to either make or recommend a final decision on the proposed adverse action),

c. the amount of time (but not less than 24 hours) that the employee is allowed to answer orally and in writing, and

d. the right of the employee or the employee's representative to review the material which is relied upon to support the reasons given in the notice;

2. a reasonable amount of official time to review the material relied upon to support the proposal and to prepare an answer and to secure affidavits, if the employee is otherwise in an active duty status;

3. a reasonable time, but not less than 24 hours, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

4. be represented by an attorney or other representative; and

5. a written decision at the earliest practicable date which:

a. considers only the reasons specified in the notice of proposed action,

b. specifies the reasons for the decision,

c. considers any answer of the employee and/or the employee's representative made to a designated official,

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d. is signed by an official in a higher position than the official who proposed the action (if the activity head signed the advance written notice, the next higher level of management in chain of command must sign the written decision),

e. specifies the employee's right of appeal which is to file a grievance under CPI 771 or under a negotiated grievance procedure, as appropriate, and

f. which is delivered to the employee on or before the effective date of the action.

C. Employees in receipt of an advance notice may request an additional time to respond orally and in writing. The official designated to accept the response may make a decision regarding such request.

D. An employee's choice of an employee representative may be disallowed if such representative would result in a conflict of interest or position, conflict with the priority needs of the activity, or would give rise to unreasonable costs to the Government. The terms of any applicable bargaining agreement govern representation for employees in an exclusive bargaining unit.

1. Activity heads shall redelegate authority to make a determination to disallow the choice of an employee's representative to an appropriate level no lower than the level of the official designated to make the final written decision.

2. Activity instructions shall establish an expedited process for resolving an employee's disagreement with a determination to disallow a choice of representative. At a minimum, the review process shall require an official higher than the one who made the disputed determination to make a final decision.

#### IX. PROCEDURES FOR APPEALABLE ADVERSE ACTIONS

A. An employee against whom an appealable adverse action is proposed is entitled to:

1. at least 30 days' advance written notice (unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed), stating:

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- a. the specific reasons for the proposed action,
  - b. the name and title of the official designated to hear an oral reply and/or receive the written reply (the official so designated must have authority to either make or to recommend a final decision on the proposed adverse action),
  - c. the number of days, but no less than 7 days, that the employee is allowed to answer orally and in writing,
  - d. the right of the employee or the employee's representative to review the material which is relied upon to support the reasons given in the notice, and
  - e. if appropriate, the basis of selecting a particular employee for furlough, when some but not all employees in a given competitive level are being furloughed, and the reason for the furlough.
2. a reasonable amount of official time to review the material relied upon to support the proposal and to prepare an answer and to secure affidavits, if the employee is otherwise in an active duty status;
  3. a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer—including medical documentation as defined in CPI 339 if the employee wishes the activity to consider any medical condition alleged to contribute to the reasons for the proposed action; ←
  4. be represented by an attorney or other representative; and
  5. a written decision at the earliest practicable date which:
    - a. considers only the reasons specified in the notice of proposed action,
    - b. specifies the reasons for the decision,
    - c. considers any answer of the employee and/or the employee's representative made to a designated official and any

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→ medical documentation furnished under paragraph IX.A.3, above; this must include an awareness of the affirmative obligations of the provisions of 29 CFR 1613.704, which require reasonable accommodation of a qualified handicapped employee, ←

d. is signed by an official in a higher position than the official who proposed the action (if the activity head signed the advance written notice, the next higher level of management in chain of command must sign the written decision),

e. specifies the employee's right of appeal which is to the Merit Systems Protection Board (MSPB) and right, when applicable, to file a grievance under negotiated grievance procedures, but not both,

f. provides the time limits for filing an appeal to MSPB, the address of the appropriate Board office for filing the appeal, a copy of the Board's regulations and a copy of the Board's appeal form (Appendix C), and

g. which is delivered to the employee on or before the effective date of the action.

B. Since a hearing shall be made available at an employee's request after an action has been effected, activities may not provide for a hearing in lieu of or in addition to the opportunity for written and oral answer.

C. When the crime provision is invoked, activities may effect an action in less than 30 days following the advance written notice. Activities may require the employee to furnish any answer to the proposed action and affidavits and other documentary evidence in support of the answer within such time as under the circumstances would be reasonable, but not less than seven days. When the circumstances require immediate action, the activity may place the employee in a nonduty status with pay for such time, not to exceed 30 days, as is necessary to effect the action.

D. ~~The advance written notice and opportunity to answer are not necessary for furlough without pay due to unforeseen circumstances such as sudden breakdowns of equipment, act of God, or sudden emergencies requiring immediate curtailment of activities.~~

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D. Employees in receipt of an advance notice may request an additional time to respond orally and in writing. The official designated to accept the response may make a decision regarding such request.

E. After its review of any medical documentation supplied by the employee in reply to a proposed action, the activity may, if authorized, require a medical examination or, at its option, offer a medical examination in accordance with the criteria and procedures established in CPI 339. If the employee has five years of civilian service, the activity shall provide information concerning disability retirement. An employee's application for disability retirement shall not preclude or delay any other appropriate personnel action. An activity shall file application for disability retirement for an employee only under the basis set forth in CPI 831-S10.←

F. An employee's choice of an employee representative may be disallowed if such representation would result in a conflict of interest or position, conflict with priority needs of the activity, or would give rise to unreasonable costs to the Government. The terms of any applicable bargaining agreement govern representation for employees in an exclusive bargaining unit.

1. Activity heads shall redelegate authority to make a determination to disallow the choice of an employee's representative to an appropriate level no lower than the level of the official designated to make the final written decision.

2. Activity instructions shall establish an expedited process for resolving an employee's disagreement with a determination to disallow a choice of representative. At a minimum, the review process shall require an official higher than the one who made the disputed determination to make a final decision.

#### X. ROLE OF PERSONNEL OFFICES

A. The servicing civilian personnel office will provide advice and guidance to employees and managers involved in adverse actions.

B. The servicing civilian personnel office shall maintain records required by paragraph XI of this instruction.

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## XI. RECORDS

A. A record shall be maintained which, at a minimum, shall contain copies of:

1. The proposed action.
2. The employee's written answer, if any.
3. A summary of the employee's oral reply, if one was made.
4. The notice of decision and the reasons therefor.
5. Any supporting material.
6. Any order effecting the decision.

→ B. If an employee appeals to the MSPB, the record shall be furnished to the employee affected upon the employee's request and to the MSPB. The record shall be submitted to the appropriate field office in the following manner:

1. The documents should be placed in date order with the earliest dated document at the bottom and the latest dated document at the top.

2. A table of contents should be prepared which identifies the case and lists all the enclosed documents (the earliest dated document should be identified and tabbed as number 1, the next document in date sequence should be identified and tabbed as number 2, and so on. The highest number should indicate the most recent document.

3. The table of contents should have the following headings:

<u>Location</u>	<u>Date</u>	<u>Document Description</u>	<u>Source</u>
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(The location indicates the tab number under which the document is filed; the date is the date of receipt or issuance of the document; document description should fully identify the document; source should indicate the submitter of the document.)

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4. Place the completed table of contents on top of the tabbed documents or, if a manila folder or equivalent is used, place the table of contents on the left side of the folder and the tabbed documents on the right side. ←

## XII. REPORTS

Statistics on formal adverse actions effected under this CPI shall be generated by the Personnel Automated Data System (PADS) and reviewed by CNO (Op-14) and the Commandant of the Marine Corps (MPC-30) for Marine Corps activities. Inconsistencies revealed by such review shall be referred to the appropriate level of command for resolution.

## XIII. IMPLEMENTING INSTRUCTIONS

Activities are required to issue local instructions implementing this Civilian Personnel Instruction by 1 October 1981.

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**APPENDIX A - Guidance in effecting disciplinary actions****A. Purpose**

The purpose of Appendix A is to provide advice and guidance to supervisors and managers in effecting disciplinary actions. While none of this advice and guidance is mandatory, it should be understood to constitute minimum acceptable procedure and followed under normal disciplinary situations. See FPM 752 for detailed advice and guidance of a predominately technical nature.

**B. DON philosophy of discipline**

Discipline is a managerial tool intended to correct deficiencies in employee behavior and attitude, correct situations which interfere with efficient operations, maintain high standards of government service and maintain public confidence in the Department of the Navy. It is not the philosophy of DON to utilize disciplinary measures for the sole purpose of punishing employees. An employee whose behavior is not acceptable to management but whose behavior is not corrected is quite likely to persist in that unacceptable behavior in the erroneous belief that it is correct, or at least condoned. Supervisors and managers have an obligation to such employees to correct behavioral deficiencies while they are still minor and before the behavior becomes habit and a bad example to others. It is easier to correct a first instance of deficient behavior than to ignore the situation and later try to correct the third, fourth, or fifth instance. It is easier and better management to correct a minor case of deficient behavior than to ignore the situation and allow the problem to become a major one.

**C. Guidance in selecting a proper course of disciplinary action**

1. **CHOOSE THE MINIMUM DISCIPLINARY ACTION LIKELY TO CORRECT THE IMPROPER BEHAVIOR.** Most people would not use an elephant gun in hunting rabbits and this analogy holds true in choosing disciplinary actions. For example, it would be foolish to attempt to correct an employee's first instance of tardiness by imposing a 1-day suspension. Such an action could create a significant amount of resentment in the employee and do more damage than good. Determining the minimum action likely to correct the problem is extremely important and a responsibility which frequently lies with the first line supervisor.

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2. **DISCIPLINARY ACTIONS MUST BE FAIR AND JUST.** This is another way of saying that there must be similar actions for similar offenses. This does not mean that all similar actions must bear identical remedies since there are other factors such as mitigating circumstances which should be considered. It is important that managers have good reasons for imposing significantly different remedies for similar offenses. A good place to start in determining a proper remedy is to look at Appendix B. While the schedule of corrective actions in Appendix B is not mandatory, most actions within the DON fall within its limits and there should be good reasons for deviation from the guide when it occurs.

3. **DISCIPLINARY ACTIONS SHOULD BE TIMELY.** Being timely does not mean that disciplinary actions should be taken in haste. Disciplinary actions should not be taken precipitately because important facts might be ignored. However, the corrective influence of a suspension, for example, is greatly diminished if it follows the offense by six months or a year.

4. **MITIGATING, UNUSUAL, OR AGGRAVATING CIRCUMSTANCES SHOULD BE CONSIDERED IN DETERMINING A PROPER DISCIPLINARY ACTION.** Such considerations as the employee's position, length of service, prior disciplinary actions, etc., should be taken into consideration. If at all possible, obtain the employee's version of the events before initiating a disciplinary action. It may be that the employee will have an acceptable explanation or be able to present mitigating circumstances.

5. **CONSIDER THE EMPLOYEE AS A UNIQUE INDIVIDUAL.** What is the employee's attitude? Does the employee fully understand the nature of the offense and why the manager is troubled? Is the offense part of a continuing behavioral pattern or does it represent an isolated action? Has the employee been led to believe that the behavior in question is appropriate?

#### D. Alternative courses of action

While it is a generally bad idea to ignore instances of employee misconduct, all misconduct does not warrant disciplinary action. There are other forms of correction available.

1. **EXPLANATION OR TRAINING.** If the employee is unaware of the proper performance or conduct, it may be that training, or perhaps a sound explanation, will be sufficient to correct the

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problem. This alternative is likely to be appropriate particularly when the employee is new or working in an unfamiliar environment.

→2. CIVILIAN EMPLOYEE ASSISTANCE PROGRAM (CEAP). As a general rule it is in the best interest of DON to rehabilitate rather than remove an employee. Misconduct is not always willful. It may stem from alcoholism, misuse of drugs, or from other personal problems which may be helped through the Civilian Employee Assistance Program (CEAP). A manager should seek guidance and advice from the civilian personnel office on whether to refer an employee to a CEAP counselor or take disciplinary action. ←

→3. PERFORMANCE RATINGS. Most employees are aware of the importance of performance ratings and want to receive favorable ratings. Employees who are under the Merit Pay System know that the amount of their salary depends in large part upon good performance appraisals. A discussion about performance and/or a low performance appraisal should have a positive effect in improving employee performance. If an employee's performance becomes unacceptable, that employee may be demoted or removed in accordance with CPI 432. ←

→4. WITHHOLDING WITHIN-GRADE INCREASES. If an employee's performance does not warrant a within-grade-increase, it is appropriate to give the employee a negative determination. This procedure is available to defer or deny unearned incremental salary increases and to motivate the employee to improve current performance. See CPI 431 for further details. ←

~~5. FITNESS FOR DUTY EXAMINATIONS. Misconduct may be the result of illness. In such \*\* instances, reassignment to a position which the employee can physically handle or retiring the employee on disability is preferable to effecting disciplinary action. One way that management has of determining whether or not illness is the cause of the misconduct is to refer the employee for a fitness-for-duty examination.~~ SEE CH-76 6/6/84

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5. VOLUNTARY ACTION BY AN EMPLOYEE. An employee who is confronted by management with a potential disciplinary situation may volunteer to accept a lower grade, a reassignment or resign in lieu of a disciplinary action. → However, management must not coerce the employee into taking such an action. ← It is permissible to tell an employee that a removal action is contemplated and that if he/she resigns before an action is proposed, no record will be made in the Official Personnel File. It is not permissible to tell the employee that he/she must resign or face a removal action. The latter example is coercion, and must be avoided. See FPM 752 for further details. ←

6. LETTERS OF CAUTION. A supervisor may want to warn an employee that continued instances of misconduct may lead to disciplinary action. In such instances, the supervisor may wish to issue a nondisciplinary letter cautioning the employee that future misconduct may lead to disciplinary action. These letters are not disciplinary or adverse actions. The warning is prospective only and is not grievable.

7. LETTERS OF REQUIREMENT. In cases of sick or annual leave abuse, or other specific performance deficiencies, a supervisor may wish to impose requirements on an individual which do not apply to the rest of the work force. This can be done by issuing a letter of requirement which establishes the precise circumstances under which leave will be approved or precisely what performance is required. Letters of requirement are not disciplinary actions. Letters of requirement are nothing more than written orders.

#### E. Special disciplinary situations

1. LEAVE ABUSE. Leave Without Pay (LWOP) is an approved absence. Supervisors should not attempt to impose disciplinary action based on instances of LWOP. If an employee is absent without permission, that employee must be carried as Absent Without Leave (AWOL). A charge of AWOL will support a disciplinary action. However, every instance of AWOL does not demand a disciplinary action. An employee who is AWOL will not be compensated for the period of unapproved absence. A supervisor may determine that the loss of pay is sufficient motivation to prevent such absences in the future.

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2. LEAVE WITH PAY. In unusual cases, an employee's actions may represent a threat to life, health or government property, and it may be necessary to remove the employee from the worksite while a disciplinary action is being processed. In such instances, it is permissible to place the employee in a nonduty status with pay for up to 30 days. See CPI 630 and FPM 752 for a detailed discussion of this option.

→ 3. INDEFINITE SUSPENSION. If there is good reason, such as an indictment, to believe that an employee is guilty of a crime, it is possible to place the employee on an indefinite suspension pending resolution of the matter. Though an indefinite suspension is of unspecified duration, the same rules apply as to any type of suspension. If it is expected that the indefinite suspension will last for more than 14 days, the employee must be given 30 days' notice (7 days if the crime provision is invoked), and the employee has the right to appeal to the Merit Systems Protection Board (MSPB). "Emergency" suspensions without giving employees the proper notice period and appeal rights are no longer permitted (Cuellar v. U.S. Postal Service, MSPB Docket No. SF075299045, November 13, 1981). FPM 752 should be reviewed carefully before an indefinite suspension is proposed.

4. DRUG ABUSE PROBLEMS. All civilian employees of the DON support, directly or indirectly, the mission of the operating forces. Drug abuse among these employees has a detrimental effect on their health, conduct and performance and, therefore, undermines their ability to provide the necessary level of support to assure the readiness of those forces. Consequently, because drug abuse is incompatible with safe, effective and efficient mission accomplishment, it must be detected and eliminated. SECNAVINST 5300.28 prohibits the wrongful or illegal possession or use of marijuana, narcotics or other controlled substances in any amount, or the sale, promotion or distribution of marijuana, narcotics or other controlled substances or drug paraphernalia. Such prohibited misconduct may

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warrant administrative corrective action up to and including removal. However, when such abuse is determined to be a handicapping condition, as defined by the Rehabilitation Act of 1973, and the activity knew or should have known that the condition existed prior to the incident giving rise to the consideration of disciplinary action, it must be dealt with in accordance with the provisions of the CEAP as promulgated by CPI 792.

a. Effecting Adverse Actions. Whether the drug abuse involves the possession, use, sale or transfer of drugs or drug paraphernalia, any resulting adverse action must demonstrate compliance with certain precedential decisions rendered by the Merit Systems Protection Board (MSPB). By its decision in Merritt v. Department of Justice, MSPB has determined that it is the activity's burden to prove the existence of a logical and reasonable nexus between the misconduct (on or off-duty) on which the adverse action is based, and the adverse effect which that misconduct had on the employee's performance, the performance of others, or the mission of the activity. Activities are cautioned to avoid limiting their nexus demonstration to an assertion that the action taken or proposed promotes the efficiency of the service. MSPB has ruled that such an assertion, per se, fails to establish the nexus. In its decision in Merritt, MSPB ruled that off-duty use of marijuana, in and of itself, did not provide the requisite nexus. Therefore, adverse actions taken for off-duty use of marijuana will likely be reversed by MSPB in the absence of an appropriate showing of nexus. Further, MSPB has determined through its decision in Douglas v. Veterans Administration that it is the activity's burden to show the reasonableness of the penalty after appropriate consideration of each of the applicable mitigating factors established by that decision. When an employee has been convicted for criminal misconduct involving drugs, and an adverse action is warranted, the adverse action should be based on the events upon which the conviction is based, and not on the conviction itself since the conviction could be appealed and overturned, thus eliminating the justification for the adverse action (the same applies to arrests and indictments). In summary, the requirements imposed by Merritt and Douglas must be met by the activity in any adverse actions based on misconduct involving drugs regardless

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of the nature of the misconduct (i.e., possession, use, sale or transfer) or whether the misconduct occurred on-duty or off-duty. Activities should also note that the Merritt and Douglas decisions are applied by arbitrators in arriving at awards rendered under the grievance/arbitration process.

b. Drug Use and Reasonable Accommodation. In Ruzek v. General Services Administration, MSPB ruled that drug abuse, like alcoholism, is a handicapping condition requiring reasonable accommodation. Accordingly, when an employee's unacceptable performance or misconduct on duty is caused by the effects of the use of illegal drugs, and the activity knew or should have known that the condition existed prior to the incident giving rise to the consideration of disciplinary action, reasonable accommodation, including the use of sick leave, must be accorded to that employee prior to the initiation of adverse action for the unacceptable performance or misconduct. In accordance with CPI 792, Civilian Employee Assistance Program, the employee's supervisor is obligated to (1) refer the employee to a Contact and Referral Counselor (C&RC) for assistance and (2) warn the employee that continued performance or conduct problems may result in disciplinary action. If the employee refuses to seek the assistance of or cooperate with the C&RC or health care facility designated to assist in rehabilitation, the activity has fulfilled the reasonable accommodation requirement and may then initiate appropriate adverse action based upon the unacceptable performance (see CPI 432) or misconduct (see CPI 752). Notwithstanding the decision in Ruzek, the entitlement to reasonable accommodation does not arise unless the employee establishes that the unacceptable performance or misconduct was caused by the handicapping condition (drug use) as defined by the Rehabilitation Act of 1973, and that the activity knew or should have known that the condition existed prior to the incident giving rise to the consideration of disciplinary action. Accordingly, although activities can and should initiate adverse action when warranted, they should be alert to the possibility of this defense by the employee. Further, even in instances where there is a requirement to accommodate, that requirement has limits and may be met by a showing that the requisite reasonable accommodation would impose an undue hardship on the

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activity. Like Merritt and Douglas, the Ruzek decision is also applied by arbitrators in arriving at awards rendered under the grievance/arbitration process. ←

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**APPENDIX B - Guideline schedule of disciplinary offenses and recommended remedies for civilian employees in the Department of the Navy (greater or lesser remedies may be assessed depending upon circumstances).**

**INSTRUCTIONS FOR USE OF THE SCHEDULE**

1. The schedule is not intended to cover every possible offense. Remedies for offenses not listed will be determined consistent with the guidelines contained herein. → (See Douglas v. Veterans Administration, MSPB Docket No. ATO75299006, April 10, 1981, for guidance on selection of penalties.) ←

2. Many of the items listed on this schedule combine several offenses in one statement connected by the word "OR". Usage of the word "OR" in a charge makes it nonspecific. Therefore, use only the items which describe the employee's actual conduct and leave out parts which do not apply.

3. Remedies for disciplinary offenses will, in general, range from the minimum to the maximum indicated. → Depending on mitigating or aggravating factors, a remedy outside the general range may be imposed. ←

4. Suspension remedies on this schedule refer to calendar days.

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5. In considering past offenses in determining a remedy, the following limitations must be observed:

a. Oral and written admonishments may not be counted as prior offenses in determining a remedy;

b. A letter of reprimand may be counted as a prior offense provided the letter of reprimand is dated no more than two years before the date of the proposed notice of adverse action in which it is cited;

c. A suspension or reduction in grade or pay (if effected for disciplinary reasons) may be counted as a prior offense provided the effective date of the suspension or reduction in

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grade or pay is not more than three years before the date of the proposed adverse action in which it is cited.

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d. In utilizing past offenses in determining a corrective action, the notice of proposed adverse action should cite specifically the past offense in sufficient detail to allow the employee to respond. Past offenses may only be counted if the employee was disciplined in writing, the employee had the right to dispute the action to a higher level, and the action was made a matter of record in the official personnel folder (Howard v. Department of the Army, MSPB Docket No. PH075209128, May 15, 1981.) ←

6. For information concerning other offenses for which employees may be disciplined by removal, fine or imprisonment, see FPM Chapter 735.

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## OFFENSE AND RANGE OF REMEDIES

OFFENSE	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
<u>ATTENDANCE</u>			
EXCESSIVE UNAUTHORIZED ABSENCE (MORE THAN 5 CONSECUTIVE WORK DAYS)	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
FALSIFYING ATTENDANCE RECORD FOR ONESELF OR ANOTHER EMPLOYEE	Reprimand to 5-day suspension	5-day suspension to removal	10-day suspension to removal
LEAVING JOB TO WHICH ASSIGNED OR NAVY PREMISES AT ANY TIME DURING WORKING HOURS WITHOUT PROPER PERMISSION	Reprimand to 5-day suspension	5- to 10-day suspension	10-day suspension to removal
UNEXCUSED OR UNAUTHORIZED ABSENCE ON ONE OR MORE SCHEDULED DAYS OF WORK OR ASSIGNED OVERTIME	Reprimand to 2-day suspension	1- to 5-day suspension	5-day suspension to removal
UNEXCUSED TARDINESS	Reprimand	Reprimand to 1-day suspension	Reprimand to 2-day suspension
<u>CONDUCT</u>			

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UNAUTHORIZED POSSESSION (INCLUDING ACTUAL OR ATTEMPTED WRONGFUL REMOVAL FROM ITS PROPER LOCATION) OF GOVERNMENT PROPERTY OR THE PROPERTY OF OTHERS

Reprimand to removal

5-day suspension to removal

10-day suspension to removal

→ Do not use "theft" as a charge unless the definition in Black's Law Dictionary can be met. ←

CRIMINAL, DISHONEST, INFAMOUS OR NOTORIOUSLY DISGRACEFUL CONDUCT

Reprimand to removal

5-day suspension to removal

10-day suspension to removal

→ HAVING AN ADVERSE EFFECT ON THE EFFICIENCY OF THE SERVICE ←

DISOBEDIENCE TO CONSTITUTED AUTHORITIES, OR DELIBERATE REFUSAL TO CARRY OUT ANY PROPER ORDER FROM ANY SUPERVISOR HAVING RESPONSIBILITY FOR THE WORK OF THE EMPLOYEE; INSUBORDINATION

Reprimand to 5-day suspension

5-day suspension to removal

10-day suspension to removal

DISORDERLY CONDUCT; FIGHTING; THREATENING OR ATTEMPTING TO INFLICT BODILY INJURY TO ANOTHER; ENGAGING IN DANGEROUS HORSEPLAY; OR RESISTING COMPETENT AUTHORITY

Reprimand to removal

5-day suspension to removal

10-day suspension to removal

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DISRESPECTFUL CON-  
DUCT, USE OF  
INSULTING, ABUSIVE  
OR OBSCENE  
LANGUAGE TO OR ABOUT  
OTHER PERSONNEL

Reprimand to  
5-day suspen-  
sion

5-day  
suspension  
to removal

10-day  
suspension  
to removal

FAILURE TO CARRY  
OR SHOW PROPER  
IDENTIFICATION ON  
NAVY PREMISES AS  
REQUIRED BY COMPE-  
TENT AUTHORITY

Reprimand to  
1-day suspen-  
sion

1- to 2-day  
suspension

2- to 5-day  
suspension

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FALSIFICATION,  
MISSTATEMENT,  
OR CONCEALMENT  
OF MATERIAL FACT  
IN CONNECTION WITH  
ANY OFFICIAL RECORD

Reprimand to  
removal

5-day  
suspension  
to removal

10-day  
suspension  
to removal

FALSE TESTIMONY  
OR REFUSAL TO  
TESTIFY IN AN  
INQUIRY, INVESTI-  
GATION OR OTHER  
OFFICIAL PROCEEDING

Reprimand to  
removal

5-day  
suspension  
to removal

10-day  
suspension  
to removal

FILING FALSE  
CLAIMS AGAINST  
THE GOVERNMENT  
OR KNOWINGLY  
AIDING AND  
ASSISTING IN THE  
PROSECUTION OF SUCH  
CLAIMS

Reprimand to  
removal

5-day  
suspension  
to removal

10-day  
suspension  
to removal

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KNOWINGLY MAKING FALSE OR MALICIOUS STATEMENTS WITH THE INTENT TO HARM OR DESTROY THE REPUTA- TION, AUTHORITY, OR OFFICIAL STANDING OF INDIVIDUALS OR ORGANIZATIONS	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
*CARELESS WORKMAN- SHIP RESULTING IN SPOILAGE OR WASTE OF MATERIALS OR DELAY IN PRODUCTION	Reprimand to 5-day suspen- sion	5- to 10-day suspension	10-day suspension to removal
*COVERING UP OR ATTEMPTING TO CONCEAL DEFECTIVE WORK; REMOVING OR DESTROYING SAME WITHOUT PERMISSION	Reprimand to 2-day suspen- sion	1- to 5-day suspension	5-day suspension to removal
*FAILURE OR DELAY IN CARRYING OUT ORDERS, WORK ASSIGNMENTS OR INSTRUCTIONS	Reprimand to 2-day suspen- sion	1- to 5-day suspension	5-day suspension to removal

→\*Action should be taken under CPI 432 rather than CPI 752 if these areas are covered in employee's critical elements and performance standards. ←

LOAFING, WASTING TIME, OR INATTEN- TION TO DUTY	Reprimand to 2-day suspension	1- to 5-day suspension	5-day suspension to removal
SLEEPING ON DUTY	Reprimand to 5-day suspen- sion	5-day suspension to removal	10-day suspension to removal

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a. WHERE LIFE OR PROPERTY IS ENDANGERED	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
→ UNAUTHORIZED USE OF, LOSS OF, OR DAMAGE TO GOVERNMENT PROPERTY OR THE PROPERTY OF OTHERS ←	Reprimand to Removal	5-day suspension to removal	10-day suspension to removal
GAMBLING OR BETTING DURING WORKING HOURS	Reprimand to 2-day suspen- sion	Reprimand to 5-day suspen- sion	Reprimand to removal
PROMOTION OF GAMBLING ON NAVY PREMISES	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
WILLFUL DAMAGE TO GOVERNMENT PROPERTY OR THE PROPERTY OF OTHERS	Reprimand to 5-day suspension	5-day suspension to removal	10-day suspension to removal
<u>DISCRIMINATION</u>			
DISCRIMINATION AGAINST AN EMPLOYEE OR APPLICANT BECAUSE OF RACE, COLOR, RELIGION, SEX, HANDICAP, NATIONAL ORIGIN, OR AGE OR ANY REPRISAL ACTION → ON SUCH BASIS ← AGAINST AN EMPLOYEE	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
SEXUAL HARASSMENT	Reprimand to removal	5-day suspension to removal	10-day suspension to removal

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**SAFETY**

<b>FAILURE TO OBSERVE PRECAUTIONS FOR PERSONAL SAFETY, POSTED RULES, SIGNS, WRITTEN OR ORAL SAFETY INSTRUCTIONS, OR TO USE PROTECTIVE CLOTHING OR EQUIPMENT</b>	Reprimand to 2-day suspension	1- to 5-day suspension	10-day suspension to removal
<b>VIOLATION OF SAFETY REGULATION WHICH ENDANGERS LIFE OR PROPERTY</b>	Reprimand to 5-day suspension	2-day suspension to removal	10-day suspension to removal
<b>ENDANGERING THE SAFETY OF OR CAUSING INJURY TO PERSONNEL THROUGH CARELESSNESS</b>	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
<b>FAILURE TO OBSERVE NO SMOKING REGULATIONS OR CARRYING MATCHES IN RESTRICTED AREAS</b>	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
<b>VIOLATING TRAFFIC REGULATIONS, RECKLESS DRIVING ON NAVY PREMISES, OR IMPROPER OPERATION OF MOTOR VEHICLE</b>	Reprimand to 2-day suspension	Reprimand to 5-day suspension	5- to 10-day suspension

**SECURITY**

<b>FAILURE TO SAFEGUARD CLASSIFIED MATTER OR OTHER SECURITY</b>	Reprimand to 5-day suspension	5-day suspension to removal	10-day suspension to removal
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## VIOLATIONS

a. WHEN CLASSIFIED MATERIAL HAS BEEN COMPROMISED	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
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PROHIBITED PERSONNEL PRACTICE

COMMITTING A PROHIBITED PERSONNEL PRACTICE (SEE 5 U.S.C. 2302)	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
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→ SUBSTANCE ABUSE

\*Referral to Civilian Employee Assistance Program and reasonable accommodation must be provided prior to initiation of disciplinary action when the employee's substance abuse is a handicapping condition as defined in the Rehabilitation Act of 1973 (29 C.F.R. 1613.701 et seq.) and the activity knew or should have known that the condition existed prior to the incident giving rise to the consideration of disciplinary action.

POSSESSION OF MARIJUANA, A NARCOTIC, OR A CONTROLLED SUBSTANCE OR DRUG PARAPHERNALIA WITHOUT AUTHORIZATION ON DUTY	Reprimand to removal	10-day suspension to removal	14-day suspension to removal
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*REPORTING FOR DUTY UNDER THE INFLUENCE OF MARIJUANA, A NARCOTIC, OR A CONTROLLED SUBSTANCE WITHOUT AUTHORIZATION	14-day suspension to removal	30-day suspension to removal	Removal
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*USE OF OR BEING UNDER THE INFLUENCE OF MARIJUANA, A NARCOTIC, OR A CON- TROLLED SUBSTANCE WITHOUT AUTHORI- ZATION ON DUTY	14-day suspension to removal	30-day suspension to removal	Removal
UNAUTHORIZED SALE OR TRANSFER OF MARIJUANA, A NARCOTIC, OR A CON- TROLLED SUBSTANCE OR DRUG PARAPHERNALIA ON DUTY	30-day suspension to removal	Removal	
UNAUTHORIZED POSSESSION OF ALCOHOL ON DUTY	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
*REPORTING FOR DUTY UNDER THE INFLUENCE OF ALCOHOL	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
*USE OF OR BEING UNDER THE INFLUENCE OF ALCOHOL ON DUTY	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
UNAUTHORIZED SALE OR TRANSFER OF ALCOHOL ON DUTY	Reprimand to removal	5-day suspension to removal	10-day suspension to removal ←

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